

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1471 of 1989

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?  
Nos. 1 to 5 - No.
- 

CHIMANLAL M MEHTA

Versus

JASUBEN C MEHTA & ANOTHER

-----

Appearance:

MR SUREN M SHAH for Petitioners

MR KN VALIKARIMWALA for Respondent No. 1

MR. ST MEHTA, ASSTT. PUBLIC PROSECUTOR for Respondent No. 2

-----

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 10/01/97

ORAL JUDGEMENT

This petition has been preferred by the husband who has been ordered to pay maintenance to his wife and minor daughter.

The wife respondent No.1 preferred maintenance application under section 125 of the Code of Criminal Procedure before the learned Judicial Magistrate, First-Class, Rajkot being Misc.Crim.Application No.415 of 1986. The wife alleged that she had married the

petitioner in the year 1963 and born him three children including the minor daughter. Since 1983 the petitioner neglected to maintain the wife and the minor daughter and she having no other source of income and being not able to maintain herself, she was entitled to maintenance for herself and the minor child from the petitioner. The said application was allowed by the learned Magistrate. Learned Magistrate allowed a monthly maintenance of Rs.400/- and Rs.350/-to the wife and the minor daughter respectively. Feeling aggrieved, the petitioner preferred a revision application being Criminal revision application No.9 of 1989 before the learned Sessions Judge, Rajkot, who under his judgment and order dated 30th September, 1989, dismissed the same. Feeling aggrieved, the petitioner has preferred this petition.

It may be noted that in course of hearing of the revision application the petitioner had restricted his challenge to the maintenance awarded to the wife and he conceded that he did not challenge the maintenance awarded to the minor daughter. In the present petition, therefore, I am concerned with the maintenance awarded to the wife alone.

It is undisputed that the petitioner and his wife were cousins i.e. their parents were the real brother and sister. The factum of marriage is not disputed. It is not disputed that three children are born out of the said marriage. Learned Advocate Mr.Shah, however, has urged that the petitioner and his wife being the children of brother and sister they were within the degree of prohibited relationship as defined under section 3(g)(iv)of the Hindu Marriage Act. In view of the said relationship the marriage between them could not have been solemnized in view of the provisions contained in section 5 of the Hindu Marriage Act. In view of the provisions contained in section 11 of the said Act, the marriage between the petitioner and his wife, being in contravention of section 5(iv)of the Act, the same is void. He has contended that the marriage being void the wife was not entitled to claim maintenance from the petitioner. He has relied upon section 125 of the Code of Criminal Procedure and has contended that it is the wife alone who can claim maintenance under the said provision and the term 'wife' necessarily means a lawfully wedded wife. He has also contended that the wife had an independent income out of the commission received as Commission Agent of the Life Insurance Corporation and that fact has not been taken into consideration by the courts below.

Mr.Shah learned Advocate appearing for the

petitioner restricts his challenge to the first contention alone and does not press his second contention i.e. that the respondent No.1 had independent income out of the Commission Agency of the Life Insurance Corporation taken in her name.

It is not disputed that the petitioner and his wife were the children of brother and sister. However, all the marriages between such children are not void as asserted by Mr.Shah. Section 5(iv) of the Act approves of the marriage between the parties who are within the degrees of prohibited relationship, provided the custom or usage governing each of them permits of a marriage between the two. Hence while considering whether such marriage can be said to be lawful or void as provided under section 11 of the Act the court has to take into consideration whether such marriage was permitted by the custom or usage governing the parties to the marriage. In the present case, the petitioner made an attempt to challenge the validity of marriage by seeking an amendment to his written statement by filing an application exh.39. However, said application was made after the witnesses were examined. In the circumstances, the court rejected the application. The order of the trial court in this regard has been upheld by the revisional court. The court while considering the said application held that the factum of marriage between the cousins was admitted and the plea sought to be advanced by the petitioner was a pure question of law and no further evidence was required to be led and, therefore, the application was rejected. I believe the trial court erred in rejecting the application. Though the plea taken by the petitioner was a pure question of law and though it was admitted that the petitioner and the wife were children of brother and sister, before holding the said marriage to be void or otherwise, the court was required to decide whether the custom or usage governing the petitioner and the wife permitted such marriage. If such plea is not permitted to be taken the respondent No.1 wife would have no opportunity to lead evidence regarding such custom or usage. In the circumstances, the matter shall have to be remanded to the trial court for further hearing.

The matter is remanded to the learned Judicial Magistrate, First-Class, Rajkot for fresh inquiry into the plea of void marriage raised by the petitioner. The petitioner will be at liberty to amend his written statement and adduce further evidence. Respondent No.1 also will be at liberty to adduce further evidence. It is further directed that the petitioner shall continue to

pay maintenance to the respondent No.1 in accordance with the direction issued by the trial court till the trial court decides the matter afresh and issues suitable direction.

Petition is allowed to the aforesaid extent.  
Rule is made absolute.

\*\*\*\*\*